Supreme Court, U.S.
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85-1382

No. -

In The

Supreme Court of the United States

October Term, 1985

RAMON COOPER ROSE,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner's rights under the Fifth and Sixth Amendments were violated by the use at his trial, as evidence of his guilt, of statements obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966).

2. Whether the court of appeals should have applied the Sixth Amendment standards applicable to impeachment of crucial witnesses in evaluating Mr. Rose's motion for new trial based on newly discovered evidence.

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals for the Fifth Circuit are:

1. Ramon Cooper Rose

2. United States of America

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES i

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTIONAL GROUNDS 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

1. The *Miranda* issue 6

2. The newly-discovered-evidence standards issue 11

CONCLUSION 15

APPENDIX A

Opinion of the United States Court of Appeals *United States v. Rose,* No. 84-1799, October 21, 1985 (unpublished) 1a

APPENDIX B

Judgment of the United States Court of Appeals *United States v. Rose, supra* 13a

Page

APPENDIX C

Denial of Petition for Rehearing
United States v. Rose, supra 15a

APPENDIX D

Excerpts from testimony and findings by the
trial court 16a

TABLE OF AUTHORITIES

Cases: Page

Alcorta v. Texas,
355 U.S. 28 (1957) 13

Brady v. Maryland,
373 U.S. 83 (1963) 14

Brooks v. Tennessee,
406 U.S. 605 (1972) 8

Davis v. Alaska,
415 U.S. 308 (1974) 13

Estelle v. Smith,
451 U.S. 454 (1981) 7

Giglio v. United States,
405 U.S. 150 (1972) 14

Giles v. Maryland,
386 U.S. 66 (1967) 13

Harris v. New York,
401 U.S. 222 (1971) 7

Harrison v. United States,
392 U.S. 219 (1967) 7

Marshall v. United States,
436 F.2d 155, 141 U.S.App.D.C. 1 (D.C.Cir.1970) 14

Miller v. Pate,
396 U.S. 1 (1967) 13

Miranda v. Arizona,
384 U.S. 436 (1966) ..... *passim*

Oregon v. Haas,
420 U.S. 714 (1975) 7

Page

Randall v. Estelle,
492 F.2d 118 (5th Cir.1974) 10

Rhode Island v. Innis,
446 U.S. 291 (1980) 10

Schneble v. Florida,
405 U.S. 427 (1972) 11

United States v. Deutsch,
475 F.2d 55 (5th Cir.1973) 14

United States v. Havens,
446 U.S. 620 (1980) 9

United States v. Rose,
No. 84-1799, October 21, 1985 (unpublished) 7, 12, 13

Constitutional Provisions:

United States Constitution, amend. V 2, 8

United States Constitution, amend. VI 2, 8, 13, 14, 15

Statutes:

21 U.S.C. § 841(a)(1) 2

21 U.S.C. § 843(b) 2

28 U.S.C. § 1254(1) 2

Miscellaneous:

Fed.R.Evi. 106 9

In The

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October Term, 1985

No. -

RAMON COOPER ROSE,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ramon Cooper Rose, Petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is unpublished. No other opinions were written by any court relating to this case.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1985. App. B, *infra*, 13a. A petition for rehearing was denied on November 20, 1985. App. C, *infra*, 15a. On January 14, 1986, Mr. Justice White extended the

time within which to file a petition for writ of certiorari to February 18, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. *The trial evidence.* Mr. Rose was charged in a six-count indictment with possession with intent to distribute cocaine (Count 1)[1] and using a telephone to facilitate a drug transaction (Counts 2 through 6).[2]

The government's case against Mr. Rose was founded upon the testimony of Donald Lee McCoy and recordings of telephone conversations between McCoy and Mr. Rose. McCoy, who had an extensive criminal record, cooperated with state and federal officials as regards this case in

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[1] A violation of 21 U.S.C. § 841(a)(1).

[2] A violation of 21 U.S.C. § 843(b).

return for assurances that he would not be imprisoned for several pending prosecutions which carried possible life sentences.

McCoy testified that in October or November 1983 he was at Mr. Rose's place of business when he observed Mr. Rose purchase eight ounces of cocaine from a third person who McCoy did not know. Mr. Rose then gave the cocaine to McCoy to "ounce up" – package the cocaine in one ounce containers – and for safekeeping. McCoy disposed of five ounces of that cocaine prior to the first week of December 1983 when Mr. Rose delivered another eight ounces of cocaine to McCoy with similar instructions. Thus, on December 12, 1983, McCoy had in his possession eleven ounces of cocaine he had received from Mr. Rose.

On December 12, 1983, McCoy had agreed to cooperate with state and federal officials. The next day, he advised those officials of his possession of the eleven ounces of cocaine and told them he had obtained the cocaine from Mr. Rose. The officials directed McCoy to telephone Mr. Rose and corroborate the report. During such call, which was recorded, Mr. Rose asked McCoy if he had gone fishing, which, according to McCoy, was a coded references to the cocaine. Five other calls were placed to and from Mr. Rose and McCoy during the next two days, in each of which, according to McCoy, innocent-sounding coded references to cocaine were used by both persons. Ultimately, after McCoy reported to Mr. Rose that "Eddie," a friend of McCoy's, was going to bring the "stuff" to McCoy on December 15, Mr. Rose and McCoy agreed to meet near Mr. Rose's place of business.

On that day, the officials furnished McCoy with a bag containing some of the cocaine he (McCoy) had previously delivered to them for the purpose of delivering the same to

Mr. Rose. McCoy met with Mr. Rose in the latter's pickup truck, and delivered the bag containing the cocaine to Mr. Rose. A brief conversation occurred in the truck, during which Mr. Rose asked McCoy, "How many ounces is that?" to which McCoy replied, "All that you gave me," and "Did you put it in ounces for me?" to which McCoy responded, "There's ounces and there's . . . grams in there too." At this juncture, McCoy departed the truck and the surveilling officials converged on the truck. Mr. Rose was arrested sitting in his truck. McCoy fled on foot, but was pursued and arrested to protect the fact of his cooperation.

Dallas police officer Jerry Foster was the first to arrive at Mr. Rose's truck, and he placed Mr. Rose under arrest and took possession of the bag containing the cocaine that McCoy had just delivered to Mr. Rose. Without administering the *Miranda* warnings, Foster told Mr. Rose he was being arrested for violating the Controlled Substances Act. Mr. Rose asked Foster, "What is the Controlled Substances Act?" to which Foster replied, "Possession of dope." Mr. Rose queried, "What do you mean?" and Foster said "Cocaine." Mr. Rose then said, "I don't know what's in it because Don McCoy just dropped it off with me." App. D, *infra,* 17a.

Mr. Rose did not testify. His defense consisted of further testimony from the case agent – FBI agent David Maniquis – and from McCoy in an effort to show "that McCoy has made all this up to try to save himself." 4 R. 741. During the examination of Maniquis, it was established that Maniquis gave sworn statements that were inconsistent with each other and with testimony adduced during the trial respecting McCoy's cooperation. Maniquis swore in an affidavit executed in support of a complaint against

Mr. Rose that McCoy had provided truthful and correct information on five occasions during the five months preceding December 15, 1983, 4 R. 765. He testified before the grand jury who indicted Mr. Rose that McCoy began cooperating in the last week of November or the first week in December 1983. 4 R. 772.

2. *Post-trial matters.* Counsel for Mr. Rose learned after trial that McCoy had testified on behalf of the government before a federal grand jury in 1980 or 1981 with respect to an investigation in which Mr. Rose was a target. This fact was not revealed to Mr. Rose prior to trial because the prosecutors asserted they were unaware of such an event.

In his motion for new trial and on appeal, Mr. Rose argued that this fact constituted a basis for a new trial because McCoy had testified during Mr. Rose's trial that he "might have" appeared before a federal grand jury in 1981, but that he did not "recall" having done so. 2 R. 226.

3. *Basis for federal jurisdiction.* The confession issue was raised during the trial at the time it was offered into evidence by the government. The newly-discovered-evidence issue was raised in a post-trial motion for new trial.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning (1) the admissibility of a confession made by an accused while under arrest without benefit of *Miranda*[3] warnings, and (2) the importance of evidence that significantly impeaches the prosecution's crucial witness in the context of a motion for new trial.

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

1.

What is at issue in this case is the admission of Mr. Rose's statement, "I don't know what's in [the paper bag] because Don McCoy just dropped it off with me," which he made during a colloquy with the arresting officer, who was holding the paper bag containing the cocaine which forms the basis of the charges against Mr. Rose.[4] The statement, which was a confession,[5] was unquestionably made following Mr. Rose's arrest and before *Miranda* warnings were given. When the existence of the statement was first revealed during the trial, the district court conducted a hearing to determine the admissibility of the statement. Apparently convinced that the statement was not admissible, the court said he would exclude the statement conditioned upon the assurance by defense counsel that the defense would not offer it into evidence. When that assurance was not given, the district court permitted the prosecution to offer the statement as evidence before the jury.

The court of appeals concluded that no error attended the admission of the statement in light of the trial court's conditional offer to exclude it and the refusal by defense counsel to agree not to use the statement.

> At the evidentiary hearing the court offered to exclude this evidence, but decided not to do so when the defense counsel would not assure the court that he would not introduce the evidence on behalf of the defense. The court accordingly allowed the prosecution to introduce the evi-

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[4]See Appendix D, *infra*.

[5]Although the statement was both inculpatory, since Mr. Rose admitted receipt and possession of the bag, and exculpatory, inasmuch as Mr. Rose disavowed knowledge of the bag's contents, both courts correctly characterized the statement as a confession.

> dence largely on the grounds that to prohibit its introduction by the prosecution would create the unfair impression that the government had suppressed or concealed the evidence if it were later introduced by the defense. It was certainly no burden to the defense to have to decide at the evidentiary hearing whether Rose would introduce this simple evidence in his own behalf; accordingly, Rose has shown no prejudice.

United States v. Rose, supra, App. A, *infra,* 9a.

The mandate of *Miranda* is simple and straightforward: statements obtained in violation of the rule announced in that case may not constitutionally be admitted into evidence during the prosecution's case in chief. *Miranda,* at 479, *Harris v. New York,* 401 U.S. 222, 224-25 (1971); *Oregon v. Haas,* 420 U.S. 714, 721-22 (1975). No exceptions to this rule have evolved, despite efforts seeking their creation.[6] For example, in *Harrison v. United States,* 392 U.S. 219 (1968), the government sought to except from *Miranda's* holding the testimony given by the accused at a former trial at which three wrongfully obtained confessions has been admitted. Concluding that the accused's testimonial admissions of guilt had been impelled by the introduction of the extrajudicial confessions, this Court declared the judicial confessions to be inadmissible as evidence at the accused's retrial. And in *Estelle v. Smith,* 451 U.S. 454 (1981), this Court was urged to exempt from

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[6]The use of inadmissible statements for impeachment purposes is not an exception to the *Miranda* rule. In both *Harris* and *Haas,* this Court upheld the use of inadmissible statements to impeach an accused's testimony because the statements were not used to establish the accused's guilt. The Court noted in both cases that the juries were instructed to consider the inadmissible statements only as impeachment evidence, and not as evidence of the accused's guilt. No such limiting instruction was given in this case.

Miranda statements made by the accused to a court-appointed psychiatrist during a post-indictment interview held to determine that accused's competency. Relying squarely upon *Miranda,* this Court concluded that neither the statements nor the psychiatrist's conclusions predicated upon those statements was admissible during the accused's trial. *Id.* at 466-71.

In this case, the court of appeals created an exception to *Miranda* which has no precedential support or logical basis. The court held that a statement which is inadmissible under *Miranda* may be 'conditionally excluded.' That is, the trial court may opt to exclude it *if the accused agrees to some condition precedent* – in this case, to not offer the statement as part of the defense – or admit it if the accused refuses to agree to the condition upon which exclusion is conditionally predicated. Such a holding ignores both the obvious import of *Miranda* – that no statement obtained in violation of the accused's Fifth and Sixth Amendment rights may be admitted as evidence against him, and compromises his rights vis-a-vis the conduct of the remainder of the trial of the case. Requiring the accused to commit to a particular course of conduct that impacts his trial as a condition of excluding an inadmissible confession impermissibly restricts his rights to remain silent and to counsel. See *Brooks v. Tennessee,* 406 U.S 605 (1972). While it may have appeared prudent at the time to submit to the conditions of exclusion and keep from the jury the inculpatory portion of the statement, developments at later stages of the trial might have dictated that admission of the statement was in Mr. Rose's best interests. This is especially true with respect to Mr. Rose's decision whether to testify or remain silent. Mr. Rose could hardly bind himself to foregoing the use of the statement before deciding whether or not to testify; if he

opted to testify, it was incumbent that he at least reserve the right to tell the jury about his statement during his direct examination, lest he be asked about it in an unfavorable light on cross-examination. See *United States v. Havens*, 446 U.S. 620 (1980). Thus, as defense counsel stated, neither he nor Mr. Rose could represent to the trial court in good faith that the defense would not seek to admit the statement, or at least the exculpatory portion of it, as part of the defense, and thereby avail themselves of the conditional exclusion of the statement.

The Hobson's choice to which Mr. Rose was subjected by the trial court's conditional exclusion of the inadmissible statement is no more necessary than it is constitutionally acceptable. If, as the trial court and the court of appeals feared, exclusion of the statement during the government's case in chief "would create the unfair impression that the government had suppressed or concealed the evidence if it were later introduced by the defense," that impression could be promptly cured by the government's introduction of the remainder of the statement after Mr. Rose elected to offer the exculpatory portion of the statement. See, e.g., Fed.R.Evi. 106, which provides that when part of a written or recorded statement is introduced, the adverse party may require any other part of the same statement to be introduced at the same time. In any event, any supposed "unfair impression" problem hardly warrants the abrogation of fundamental constitutional rights firmly established almost twenty years ago.

To the extent the lower courts were troubled by the hybrid, exculpatory and inculpatory content of the statement – as is apparent from the "unfair impression" language used by both courts – it need only be said that *Miranda* specifically excludes from admission any statement, whether exculpatory or inculpatory, obtained in

violation of its holding. 384 U.S., at 476-77; *Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980). As regards the exclusion of a statement under *Miranda*, it is irrelevant whether the statement contains inculpatory or exculpatory matters, or both. If the statement was obtained in violation of *Miranda*, it is inadmissible regardless of its content.

The observation of the court of appeals that "this 'confession' . . . was not made in response to any interrogation," App. A, *infra*, 9a, fails to apply the *Miranda* standards explicated thusly in *Innis*:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not ony to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Id. at 301. The statement in question was made during a colloquy between Mr. Rose and the arresting officer and in response to the officer's statement that Mr. Rose was being arrested for possession of the cocaine in the bag that the officer was holding in front of Mr. Rose. Such conduct — the display of the bag coupled with the assertion that Mr. Rose was being arrested for possession of cocaine ostensibly located in the bag — is the functional equivalent of express interrogation inasmuch as the officer should have known that his conduct was likely to elicit a response from Mr. Rose concerning the charge and the bag with which the office confronted him. See, e.g., *Randall v. Estelle*, 492 F.2d 118 (5th Cir. 1974), where the accused

gave a confession after being confronted with the murder weapon by police officers.

The admission into evidence of the statement was harmful to Mr. Rose because it provided the only evidence of his possession of the bag and, concomitantly, the cocaine, and credited McCoy's version of the events leading up to Mr. Rose's arrest. It cannot be said that under the circumstances of this case the admission of the confession did not contribute to the conviction. Cf. *Schneble v. Florida,* 405 U.S. 427 (1972).

In sum, Mr. Rose's statement was obtained in violation of *Miranda.* The trial court's offer to conditionally exclude the statement from evidence did not adequately protect Mr. Rose's rights under the Fifth and Sixth Amendments, as enforced in *Miranda.* In fact, that offer further compromised those rights with respect to the conduct of the remainder of the trial. By upholding the use of the statement in the context of this case, the court of appeals carved out of *Miranda* an exception that no other court has recognized. Certiorari should be granted to consider whether such an exception to *Miranda* should be permitted.

2.

The second question presented for review involves the proper relationship of newly discovered evidence which is impeaching in nature, but, in the context of the case, crucial to the defense, and a deprivation of the right of confrontation.

When asked during cross-examination if he had ever appeared before a federal grand jury in 1981 with respect to "some of [his] other cases," McCoy said, "I don't know. I might have, . . . but I don't recall." The prosecutor ob-

jected on the basis of relevancy, to which defense counsel rejoined that if McCoy had appeared before a federal grand jury in any case relating to the one on trial, the defense would be entitled to a transcript. 2 R. 256-57. The matter was not thereafter pursued, and the jury was left with the impression that McCoy had not so testified.

After trial, defense counsel learned that McCoy had testified before a federal grand jury regarding an investigation in which Mr. Rose was a target. He was, however, unable to obtain a transcript of McCoy's testimony before such grand jury.

Mr. Rose's trial strategy was to establish that McCoy had been cooperating with the authorities for more than the few days he had indicated to the jury, and that he understood the importance of 'making a case' against Mr. Rose as the *quid pro quo* for his not having to go to prison for the serious crimes he had committed. Thus, the fact that McCoy had been cooperating with federal officials in an effort to secure a conviction of Mr. Rose in other earlier investigations had a significantly greater value than mere impeachment.

Utilizing the generally accepted four-prong test applied to resolve motions for new trial based on newly discovered evidence,[7] the court of appeals concluded that a new trial was not warranted. Specifically, the court said McCoy's

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[7] To be entitled to a new trial on the grounds of newly discovered evidence, a convicted person must establish at least that: (1) the evidence is newly discovered; (2) the evidence is material and not merely cumulative or [of] impeaching value; (3) the evidence would probably lead to an acquittal; and (4) the failure to learn of the evidence was due to no lack of defense diligence.

United States v. Rose, App. A, *infra*, 14a.

answer that he "probably" had testified before a federal grand jury "put the defense on notice . . . that McCoy had testified previously," and that Mr. Rose made no showing the 'new' evidence would produce an acquittal. *United States v. Rose,* App. A, *infra,* 12a. In so ruling, the court failed to consider that the government knew or should have known that McCoy had previously testified before a grand jury, and it neglected to evaluate Mr. Rose's claim in light of his constitutional right to impeach McCoy.

Implicit in the Sixth Amendment right to confrontation is the right to impeach adverse witnesses with relevant evidence. *Davis v. Alaska,* 415 U.S. 308, 315-18 (1974). An accused may not be denied the opportunity to cross-examine witnesses with evidence that tends to discredit either the witness or his testimony. In *Giles v. Maryland,* 386 U.S. 66 (1967), this Court reversed the accused's rape convictions because the defense was prevented from adducing evidence that reflected upon the credibility of the crucial witness. In *Miller v. Pate,* 386 U.S. 1 (1967), a murder conviction was overturned because the accused was not furnished with information that crucial stains were paint stains, not blood stains, as portrayed by prosecution witnesses. And in *Alcorta v. Texas,* 355 U.S. 28 (1957), this Court set aside the accused's murder conviction because he was denied the opportunity to adduce from the prosecution's primary witness a truthful version of the events which "would have, apart from impeaching [the witness's] credibility, tended to corroborate the [accused's defensive] contention that he found his wife embracing [the witness]." These cases stand for the proposition that the impeachment value of evidence is in direct proportion to the importance of the relevant witness in the

context of the trial, and that the prosecution's complicity in preventing such impeachment aggravates the harm.

McCoy was the pivotal witness in this case. His version of his relationship with Mr. Rose, which was uncorroborated, was essential to a conviction. His recitation of the facts relevant to his cocaine transactions with Mr. Rose were critical to the government's case. And without his interpretation of the 'code' used in his telephone conversations with Mr. Rose, a conviction was hardly likely. In assessing the impact of the newly discovered evidence, it is noteworthy to recall that FBI Agent Maniquis painstakingly disavowed his prior inconsistent statements that McCoy had been cooperating with the FBI against Mr. Rose well before the events that gave rise to Mr. Rose's conviction. Under the circumstances of this case, impeachment of McCoy must be measured by Sixth Amendment standards.

To the extent Mr. Rose was required to exercise diligence to support his request for a new trial, see *Marshall v. United States,* 436 F.2d 155, 141 U.S.App.D.C. 1 (D.C. Cir.1970), he discharged that obligation by requesting, prior to trial, all discoverable materials relating to McCoy. And, in any event, it should have beeen apparent to the government during the trial, particularly when McCoy was interrogated about prior grand jury testimony, that the fact of McCoy's prior cooperation in form of grand jury testimony was subject to the production requirement of *Brady v. Maryland,* 373 U.S. 83 (1963). Even if the prosecutor was personally unaware that McCoy had previously testified before a federal grand jury, he is charged with the knowledge of that fact inasmuch as that fact was within the knowledge of someone within his office. See *Giglio v. United States,* 405 U.S. 150, 154 (1972), and *United States v. Deutsch,* 475 F.2d 55 (5th Cir.1973).

The court of appeals failed to apply the Sixth Amendment standards that guarantee an accused the right to impeach an adverse witness when it evaluated Mr. Rose's claim that he was entitled to a new trial because of the newly discovered evidence. Those standards are applicable in this case because McCoy's testimony was particularly critical to the conviction obtained. Given the posture taken by the defense, evidence that McCoy had cooperated with the government in the past in an effort to convict Mr. Rose would have established precisely what Mr. Rose was arguing but was unable to concretely prove – that the government's case against him had been manufactured by McCoy in an effort to save his own freedom.

Certiorari should be granted to allow for application of those standards under the peculiar facts of this case.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

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February, 1986

APPENDIX

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1799

CR3-84-00001 G

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON COOPER ROSE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(October 21, 1985)

Before REAVLEY and JOLLY, Circuit Judges, and SANDERS, District Judge.*

PER CURIAM:**

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*District Judge of the Northern District of Texas, sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

This case is an appeal from a criminal conviction of one count of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and five counts of using a telephone to facilitate a drug transaction in violation of 21 U.S.C. § 843(b). Because we find that the district court did not err in refusing to instruct the jury on entrapment, that the alleged noncompliance with discovery orders by the government did not warrant declaring a mistrial, and that a new trial was not required because of a witness's inconsistent statements or newly discovered evidence, we affirm on all counts.

I

In late 1983, the Federal Bureau of Investigation (FBI), the Greater Dallas Area Organized Crime Task Force, and the Dallas Police Department investigated an organized jewel theft group operating in the Dallas, Texas area. One of the targets of this investigation, Donald Lee McCoy, also known as Lawrence Eugene Owens, had an extensive criminal record. In November 1983, investigators requested McCoy's cooperation in the investigation, but they were unsuccessful.

Meanwhile, in October or November of 1983, McCoy had witnessed Ramon Cooper Rose, the appellant, purchase eight ounces of cocaine. Rose gave McCoy the cocaine for the purpose of breaking it down into ounce and gram weight units. McCoy repackaged the cocaine and disposed of five ounces of the substance; he retained control over the remaining three ounces. In early December 1983, Rose gave McCoy an additional eight ounces of cocaine, to be packaged in the same way as the first eight ounces. By December 13, McCoy was in possession of approximately eleven ounces of the appellant's cocaine.

On December 12, 1983, McCoy and his attorney met

with Assistant United States Attorney Bill Alexander. Alexander offered McCoy, in return for complete cooperation with the police and federal investigators, the opportunity to avoid prosecution for his crimes discovered by the investigators, or at least to avoid going to prison. A deal was made and, at a later meeting, police officers provided McCoy with a portable tape recorder, requesting that he record certain telephone conversations.

On December 13, 1983, McCoy and his attorney again met with investigators. After consulting privately with his attorney, McCoy told the investigators that he was in control of eleven ounces of cocaine belonging to Rose, which he was to repackage and return.

Officer Hale and FBI Agent David Maniquis were at first skeptical and merely proceeded to question McCoy regarding other matters. To corroborate McCoy's information regarding the cocaine, however, the officers directed him to telephone Rose. During the recorded conversation, Rose asked McCoy if he had gone fishing, using a coded reference to ask if McCoy had retrieved the cocaine. McCoy told Rose that he went "down there to get those eight," referring to eight ounces of cocaine, but that the presence of two squad cars prevented his doing so. Mc Coy then asked Rose to call him that evening. Rose called McCoy twice that evening and the cocaine was discussed briefly both times. These conversations were also recorded.

The next day, December 14, McCoy again met with the investigators at the hotel. At the investigators' request, he telephoned Rose and told him in coded references that McCoy had a friend who was interested in purchasing two ounces of the cocaine for $2,200 an ounce. Rose accepted the deal and then discussed the proper disposition and amount of the cocaine still in McCoy's possession. Rose

requested that McCoy bring him the remaining cocaine, and McCoy agreed. In addition, Rose told McCoy that he needed the cocaine in ounce units and asked McCoy to "ounce it up."

The same day, and again at the request of investigators, McCoy called Rose to discuss temporary possession of the cocaine. This conversation was also recorded. That evening, Rose telephoned McCoy at McCoy's home. McCoy recorded their conversation. McCoy told Rose that "Eddie," a friend of McCoy's, was going to bring "that stuff" to McCoy in the morning. Rose and McCoy agreed to meet the next day.

On December 15, McCoy again called Rose to advise him that he, McCoy, had picked up the cocaine and asked where to meet Rose. Rose directed him to an area familiar to both near a hardware store in Dallas.

After a body transmitter was placed on him, McCoy was given a controlled delivery package in a brown paper sack prepared by the investigators. McCoy then drove alone, but under surveillance, to the prearranged location in Dallas where he met Rose who arrived driving a pickup truck. McCoy then entered Rose's pickup truck and delivered the cocaine.

During the conversation in Rose's vehicle, Rose asked McCoy: "How many ounces is that?" McCoy replied, "All that you give me." Rose then asked, "Did you put it in ounces for me?" to which McCoy responded, "There's ounces and there's . . . grams in there too." Rose told McCoy, "Give it to me," and McCoy gave him the package. Rose also asked if McCoy had other ounces somewhere, and McCoy assured him that it was all there. At that point McCoy left the pickup and signalled to the surveillance officers that Rose was in possession of the cocaine. Rose was

then arrested and Investigator Foster seized the controlled delivery packages from the middle area of the front floorboard of Rose's vehicle.

Rose was later indicted and tried before a jury on one count of possession with intent to distribute cocaine and five counts of using a telephone to facilitate a drug transaction. The jury found Rose guilty on all counts.

II

A

There are several issues on appeal before this court. We are asked, first, to determine whether the trial court erred in refusing to charge the jury on entrapment. Second, we must consider whether a mistrial should have been granted, or a new trial ordered, because of the government's use of testimony alleged to be perjured. Finally, we must decide whether the trial court erred in refusing to grant Rose's motion for a new trial on the basis of allegedly newly discovered evidence.

B

The trial court refused Rose's request that the court instruct the jury on the "entrapment" defense; Rose adequately objected to the trial court's decision and now raises the issue on appeal. For the reasons discussed below we hold that the trial court did not err in refusing to so instruct the jury.

The "entrapment defense" is predicated on the rule of statutory construction under which the courts will interpret a statute to avoid "absurd" results if this is reasonably possible; absent express indications of congressional intent to the contrary, we presume Congress did not intend to

punish individuals who commit a prohibited act where the *mens rea* was "implanted" by the government itself. *United States v. Henry,* 749 F.2d 203, 207 (5th Cir. 1984). Thus, entrapment is not a confession and avoidance defense "that requires an accused to admit that he committed a crime," *id.;* nevertheless, entrapment "is an affirmative defense in that the defendant must present some evidence of entrapment before the issue is properly raised." *United States v. Hill,* 626 F.2d 1301, 1303 (5th Cir. 1980) (quoting *United States v. Gonzales,* 606 F.2d 70, 75 (5th Cir. 1979). Once such evidence is adduced, the ultimate burden of persuasion is on the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense and that the government only offered the defendant an opportunity to commit the offense. *Id.* at 1304. When the refusal to grant an entrapment instruction is challenged on appeal, we must view the evidence most favorably to the defendant. *Id.* Here, upon an examination of the record, accepting the evidence most favorable to Rose, we conclude that the evidence is insufficient to raise the issue of entrapment.

The evidence that Rose cites as raising the entrapment issue is: first, McCoy told the government agents that he possessed cocaine belonging to Rose, and the agents thereupon instructed McCoy to call Rose and set up a meeting for McCoy to give Rose the drug. Second, with one exception, McCoy, not Rose, initiated all of the telephone calls to set up the meeting. And third, McCoy testified that he was being pressured by the government agents to cooperate with them to make a case against Rose. Rose contends that this evidence is sufficient to raise the question whether McCoy, for whose acts the government is responsible, implanted in Rose the criminal design. We do not agree.

The operative facts in this case are similar to those of *Hill, supra,* in which we said:

> Concededly it was [the government] Agent . . . who first sought out and initiated contact with [the defendant], and it was [the government agent] who first proposed the illicit transaction. To raise entrapment, however, a defendant must prove more than simply that the government first solicited him or merely provided the opportunity for the crime. While some opinions of this court have expressed the defendant's threshold burden in terms of requiring some evidence of governmet *inducement,* a reading of the facts of those cases reveals that "inducement" represents more than mere suggestion, solicitation, or initiation of contact and, in faet, embodies an element of persuasion or mild coercion. . . .

Hill, 626 F.2d at 1304 (citations omitted). *See also Henry* (defendant pharmacist carried threshold burden by showing evidence that he had to be persuaded by government agent to fill a drug prescription which was without medical purpose, contrary to law).

None of the evidence cited by Rose, nor any other evidence we have found in the record, indicates that Rose had to be persuaded to perform his criminal acts or to form his criminal intent. As noted above, the mere fact that the initial contact was made by McCoy does not suffice. That the government agents brought pressure on McCoy to persuade McCoy to cooperate, is no evidence that McCoy (or other government agents) had to persuade Rose. In summary, there is no persuasive evidence that the conduct of McCoy or other government agents "create[d] a substantial risk that the offense would be committed by a person other than one ready to commit it." *Hill,* 626 F.2d at 1304 (collecting cases) (quoting *Pierce v. United*

States, 414 F.2d 163, 168 (5th Cir.), *cert. denied,* 396 U.S. 960 (1969)).

C

Rose next contends that the trial court was obligated to declare a mistrial due to government noncompliance with a pretrial discovery order, and for government failure to comply with *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which requires that exculpatory evidence be turned over to the defense. The discovery order at issue directed the prosecution to turn over all exculpatory material, any evidence covered by the Jencks Act, 18 U.S.C. § 3500, and other information by a certain deadline on penalty of a possible mistrial declaration. The evidence Rose claims was not turned over to him includes a written police report indicating that Rose's fingerprints were not found on the plastic bag containing the cocaine given by McCoy to Rose. This report was first disclosed to both the prosecutor and Rose two days before trial. Rose points out that this report is evidence that he did not handle the bag, contrary to McCoy's testimony, and could therefore have been used to impeach McCoy. However, Rose gives no explanation as to why it should have taken more than two days to prepare this simple strategy of impeachment. Moreover, nothing is alleged to have prevented Rose from recalling McCoy for impeachment purposes. Accordingly, Rose has made no showing that he would have conducted his defense any differently had the report been revealed earlier. On these facts we find no showing of prejudice. *Richards v. Solem,* 693 F.2d 760, 765 (8th Cir. 1982), *cert. denied,* 451 U.S. 916 (1983).

Rose also contends that the government was obligated to reveal before trial that Officer Foster would testify that Rose had said to him at the time of the arrest: "I don't

know what's in [the bag] because Don McCoy just dropped it off with me." Both the government and Rose learned of Foster's proposed testimony at an evidentiary hearing outside the presence of the jury during the trial. The district court characterized this statement as a "confession" under 18 U.S.C. § 3501; the statement has obvious exculpatory value, but is also inculpatory, since it is an admission of possession and knowledge. Again, Rose has shown no prejudice. At the evidentiary hearing the court offered to exclude this evidence, but decided not to do so when the defense counsel would not assure the court that he would not introduce the evidence on behalf of the defense. The court accordingly allowed the prosecution to introduce the evidence largely on the grounds that to prohibit its introduction by the prosecution would create the unfair impression that the government had suppressed or concealed the evidence if it were later introduced by the defense. It was certainly no burden to the defense to have to decide at the evidentiary hearing whether Rose would introduce this simple evidence in his own behalf; accordingly, Rose has shown no prejudice. This failure to show prejudice is also fatal to Rose's argument that the prosecution violated Federal Rule of Criminal Procedure 16(a) in failing to disclose the statement earlier. *United States v. Arcentales,* 532 F.2d 1046, 1049-50 (5th Cir. 1976); *United States v. Smith,* 557 F.2d 1206, 1210, *cert. denied,* 434 U.S. 1073 (1978). Moreover, Rule 16(a) does not apply to this "confession" because it was not made in response to any interrogation.

We also find no merit to Rose's claim that the government violated the trial court's order to provide the defense with all Jencks Act material on the day prior to the testimony of the witness to whom it relates. Rose contends that Officer Hale's notes were not made available to the defense until the officer testified, but fails to indicate

how these notes could possibly have helped in his defense. Therefore, the error, if any, was harmless.

Finally, Rose contends a tape recording of the first telephone conversation made available to the defense before trial was not complete, but contained exculpatory evidence. However, Rose does not indicate how this evidence was exculpatory or how the omissions harmed his defense, and, in any event, the complete tape was eventually played to the jury. We find no showing of prejudice on this point.

Nor has Rose indicated how the "cumulative effect" of the forgoing discovery "errors" constitutes reversible error. Accordingly, we find no reversible error in the trial court's refusal to declare a mistrial on the grounds of discovery noncompliance.

D

Rose argues that the district court erred in denying his motion for a new trial on the grounds of perjured testimony. This motion was brought by Rose under Federal Rule of Criminal Procedure 33. Under this rule the decision whether to order a new trial is committed to the discretion of the trial court. *United States v. Williams,* 613 F.2d 573, 575 (5th Cir.), *cert. denied,* 449 U.S. 849 (1980). We may set aside the district court's decision not to grant a new trial on those grounds only if the decision constituted an abuse of discretion. *Hudson v. United States,* 387 F.2d 331 (5th Cir. 1967), *cert. denied,* 393 U.S. 876 (1968). We find no abuse of discretion in this case.

Rose alleges that McCoy perjured himself when he testified that he started cooperating with the government only a few days before December 15, 1983, the date of Rose's arrest. Rose points out that FBI Agent Maniquis stated in his sworn complaint that McCoy had worked with the govern-

ment for five months prior to Rose's arrest. At trial, however, both Maniquis and McCoy testified that McCoy had cooperated with the government for only a few days prior to the arrest. Rose introduced at trial Maniquis' complaint as evidence of prior inconsistent testimony. That a witness may have made a prior statemnt that is inconsistent with his trial testimony, or inconsistent with the testimony of another witness, is hardly enough in itself to show that perjured testimony was introduced at trial. We ordinarily allow prior inconsistent statements to be used for impeachment purposes, but we do not ordinarily order a new trial solely on these grounds, *United States v. Aguiar,* 610 F.2d 1296, 1305 (5th Cir.), *cert. denied,* 449 U.S. 827 (1980), and will not in this case.

E

Rose's final assignment of trial court error is his assertion that the court should have granted his motion for new trial based on newly discovered evidence. Again, we may set aside the trial court's denial of this motion only where the decision was an abuse of discretion; we find no such abuse in this case. *Hudson, supra.*

Shortly after the trial, Rose discovered that McCoy had testified before a federal grant jury in 1980; this fact also was not known to the prosecution until after the trial was completed. Rose claims he has still not seen the transcript of the grand jury hearing, and does not know its contents, but he alleges its very existence is material and that McCoy misled the defense as to its existence. In response to discovery requests, McCoy stated that he did not remember whether he had testified before a federal grand jury.

To be entitled to a new trial on the grounds of newly discovered evidence, a convicted person must establish at least that: (1) the evidence is newly discovered; (2) the evi-

dence is material and not merely cumulative or impeaching value; (3) the evidence would probably lead to an acquittal; and (4) the failure to learn of the evidence was due to no lack of defense diligence. *United States v. Johnson,* 596 F.2d 147, 148 (5th Cir. 1979). Here, Rose presented no affidavits or other evidence with his motion for a new trial. It is therefore apparent that he has not satisfied the *Johnson* criteria. When asked at trial if he had given federal grand jury testimony previously, McCoy responded, "I probably have. I don't remember the exact time. I have been before, I imagine, yes, sir." This response put the defense on notice, if it did not give actual knowledge, that McCoy had testified previously. Certainly there has been no showing that this "new" evidence would produce an acquittal. We conclude that the district court did not abuse its discretion in denying the motion for a new trial.

III

For the reasons set out in this opinion, the judgment of conviction of Ramon Cooper Rose is

AFFIRMED.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
DEC 6 1985
NANCY HALL DOHERTY, CLERK
By /initials/ CF
Deputy

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1799

D.C. Docket No. CR-84-00001 G

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON COOPER ROSE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before REAVLEY and JOLLY, Circuit Judges, and SANDERS, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

October 21, 1985

ISSUED AS MANDATE: DEC 4 1985

A True Copy
GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ P. Keller
Deputy
New Orleans, Louisiana
DEC 4 1985

OP-JDT-9C
Rev. 4/85

U.S. COURT OF APPEALS
FILED
NOV 20 1985
GILBERT F. GANUCHEAU
Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1799

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON COOPER ROSE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

Before REAVLEY and JOLLY, Circuit Judges, and SANDERS, District Judge.*

BY THE COURT:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is GRANTED and, upon consideration, the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ JOLLY
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

*District Judge of the Northern District of Texas sitting by designation

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR 3-84-001-G
	)	
RAMON ROSE	)	

PARTIAL TRANSCRIPTION OF TESTIMONY AND RULING BY THE TRIAL COURT CONCERNING THE ADMISSIBILITY OF THE ACCUSED'S STATEMENT

[3 R. 602[1]] **MR. JERRY WAYNE FOSTER** (Recalled)

REDIRECT EXAMINATION

BY MR. REVESZ [Assistant United States Attorney]:

* * *

Q. Mr. Foster, let me ask you on December 15, 1984 when [3 R. 603] you arrested the Defendant Raymond Rose did you tell him why you had arrested him?

A. Yes, I did.

Q. Did you do that voluntarily or was that in response to a question he asked?

A. I did it voluntarily.

Q. What did you say to him?

A. I told him he was under arrest for violation of the Controlled Substances Act.

Q. Did he say anything to you?

A. He asked, What controlled substance, what is that.

---

[1] "3 R. 602" refers to volume 3 of the record on appeal, page 602.

Q. Was that in response to any question you asked him?

A. No, it was not.

Q. What did you say when he asked you that question?

A. I told him it was dope, and he said dope, and I said cocaine.

Q. All right. What did he say after you said that, if anything?

A. He told me – I don't know what – He said Don McCoy just gave it to me.

* * *

[3 R. 604] RECROSS EXAMINATION

BY MR. ETHINGTON [Defense counsel]

* * *

[3 R. 605] Q. Now, when you said whether or not the defendant knew the nature of the offense that was charged against him, did he ask you – tell us again, did he ask you what he was arrested for?

[3 R. 606] A. I told him for a controlled substance, and he said controlled substance, and I told him dope, and he says dope.

Q. Dope?

A. Dope. And I said cocaine.

Q. What did he say after that?

A. That's when he made the statement, "I don't know what's in there. Don McCoy just dropped it off to me."

Q. Did you show him this bag?

A. After this, yes. He said, "Could I see it," and I opened it and

* * *

Q. Did you advise him he had a right to remain silent?
A. I sure did.

Q. Was it before or after the comments?
A. It was after the comments.

Q. So you had not advised him of his rights?
A. No, at that time I had not.

Q. Had you told him he had a right to have a lawyer [3 R. 607] present before the comments you told him about?
A. I wasn't the one to do that. I believe Sargeant Williams did.

Q. So as far as we know none of his constitutional rights had been advised to him before this statement?
A. That's right.

Q. You did not tell him he had a right to counsel?
A. I didn't, no.

Q. You didn't tell him that he had a right to remain silent?
A. No.

Q. And that anything he might say would or could be used against him a court of law?
A .He was given those warnings, but not by me.

Q. My question was: they were not given to him prior to or during this statement that you told us about?
A. No, that's correct.

Q. And did you tell him — I'm sorry. Did you tell him that he had the right to cease the interview or not answer any questions or make and commence [sic] if he chose to?
A. No, I did not.
* * *

[3 R. 672] THE COURT: Mr. Ethington, let me ask you a question. One of counsel for the government yesterday – I believe it was Mr. Simpson – argued that if the evidence which was tendered outside the presence of the jury by Mr. Foster were to be offered for the first time by the defendant during his case in chief that it would give a misleading impression to the jury and suggest to them that the government was somehow hiding the ball or suppressing the evidence. That is a concern of mine, and I would suppose from what you have argued up to this point that if you contend it was a surprise and that you did not know of this evidence before and it was not a part of your strategy in preparing for trial that you would not expect to use this evidence during the defendant's case in chief. Is that true?

MR. ETHINGTON: I can't state that to the Court, [4 R. 673] your Honor.

THE COURT: Unless you can state that, I am going to permit that evidence because that is a very real concern, but if you tell me you do not intend to raise it as part of the defendant's case in chief, then I am going to grant your motion to exclude this evidence. But I will not grant such a motion unless you can represent to me that the evidence will not come into the case at all.

MR. ETHINGTON: May I have a moment, your Honor?

Your Honor, we cannot in good faith represent to the Court that we would restrict our presentation or the defense's case regarding this matter. We cannot say that we would agree to exclude it at this time. We feel like it would unduly restrict our ability to fully represent our client. It would invade the attorney-client privilege and could later be construed as a comment on the failure of the defendant to testify in the event he did fail to testify.

THE COURT: All right. Well, in that –

MR. ETHINGTON: So we cannot in good faith represent to the Court that we would not attempt to use it in the defense's case.

THE COURT: In that event I am going to deny the motion that was handed up a few moments ago which is entitled Motion for Mistrial or Alternatively Motion to Exclude Evidence. I will deny the motion for mistrial and [4 R. 674] also the alternative motion to exclude the evidence that was tendered outside the presence of the jury yesterday from Officer Foster. . .

[4 R. 676) (Jury in)

MR. JERRY WAYNE FOSTER

REDIRECT EXAMINATION

[4 R. 677] Q. [By Mr. Revesz]: Mr. Foster, when you arrested Defendant Raymond Rose, I'll ask you at the time you arrested him whether he asked you anything.

A. Yes, he did.

Q. Was that in response to anything you asked him?

A. No, it was not.

Q. Who spoke first, you or the defendant?

A. I told him he was under arrest, and he asked me the question.

Q. What did he ask you?

A. He asked me what he was under arrest for?

Q. What did you respond?

A. I told him he was arrested, one, for violation of the Controlled Substances Act.

Q. Did he say anything else?

A. Yes, he did.

Q. What was that?

A. He said, "What is the Controlled Substances Act?," and I said, "Possession of dope."

Q. Did you have Government's Exhibit 9[2] and its contents in your hand at the time?

A. Yes I did.

Q. Was it closed or open?

[4 R. 678] A. It was closed.

Q. After you said dope, what did he say then, if anything?

A. He said, "What do you mean?," and I said, "Cocaine."

Q. Did he say anything after that?

A. At that time he made the statement, he said, "I don't know what's in it because Don McCoy just dropped it off with me."

---

[2]Government's Exhibit 9 was the bag found in Mr. Rose's truck in which the cocaine was found.

Supreme Court, U.S.
FILED
MAY 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1382

In the Supreme Court of the United States

OCTOBER TERM, 1985

RAMON COOPER ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MAURY S. EPNER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court erred by admitting into evidence a statement volunteered by petitioner at the time of his arrest.

2. Whether the district court abused its discretion by denying petitioner's motion for a new trial on the basis of newly discovered evidence.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 7

Alcorta v. *Texas*, 355 U.S. 28 10

Brady v. *Maryland*, 373 U.S. 83 ..... 4, 7

Davis v. *Alaska*, 415 U.S. 308 10

Giles v. *Maryland*, 386 U.S. 66 10

Lawn v. *United States*, 355 U.S. 339 7

Mesarosh v. *United States*, 352 U.S. 1 10

Miller v. *Pate*, 386 U.S. 1 10

Miranda v. *Arizona*, 384 U.S. 436 ..... 6, 7, 8

Randall v. *Estelle*, 492 F.2d 118 8

Rhode Island v. *Innis*, 446 U.S. 291 7

United States v. *Cardarella*, 588 F.2d 1204 9

United States v. *Herman*, 614 F.2d 369 9

United States v. *Johnson*, 596 F.2d 147 9

Page

Cases—Continued:

United States v. *Librach*, 609 F.2d 919, cert. denied, 444 U.S. 1080 10

United States v. *Lovasco*, 431 U.S. 783 7

United States v. *Pappas*, 602 F.2d 131, cert. denied, 444 U.S. 949 9

United States v. *Rodriguez*, 738 F.2d 13 10

Constitution, statutes and rule:

U.S. Const. Amend. VI 10

21 U.S.C. 841(a)(1) 1

21 U.S.C. 843(b) 2

Fed. R. Crim. P. 16(a) 4, 5, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1382

RAMON COOPER ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on October 21, 1985, and a petition for rehearing was denied on November 20, 1985 (Pet. App. 15a). On January 14, 1986, Justice White extended the time for filing a petition for a writ of certiorari to February 18, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and five

counts of using a telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b). He was sentenced to three years' imprisonment on the possession count and a two-year term on each of the facilitation counts. The two-year terms on the facilitation counts were made to run concurrently with each other but consecutively to the three-year term on the possession count. Petitioner also was sentenced to a three-year special parole term and ordered to pay a $10,000 fine.

1. The evidence adduced at trial, as summarized in the opinion of the court of appeals (Pet. App. 2a-5a), showed the following. In October or November 1983, Donald McCoy observed a transaction in which petitioner purchased eight ounces of cocaine. Petitioner gave the cocaine to McCoy and directed McCoy to divide the substance into one-ounce and one-gram units. McCoy disposed of five ounces of the repackaged cocaine and retained the remaining three ounces. In early December 1983, petitioner gave McCoy an additional eight ounces of cocaine for repackaging. McCoy retained possession of this cocaine as well. *Id.* at 2a.

McCoy and his attorney met with an Assistant United States Attorney on December 12, 1983, and agreed to cooperate with the government. Police officers then furnished McCoy with a portable tape recorder and requested that he record certain telephone conversations. The next day, McCoy informed the authorities that he was in possession of 11 ounces of cocaine belonging to petitioner. To dispel their skepticism regarding McCoy's claim, the authorities directed McCoy to telephone petitioner. During the recorded telephone conversation, petitioner asked McCoy if McCoy had the cocaine in his possession. Later that evening, petitioner twice telephoned McCoy and discussed the cocaine. Pet. App. 2a-3a.

McCoy again met with law enforcement officers on the following day, December 14, 1983. At the officers' request, McCoy telephoned petitioner and told petitioner that he had a friend who wished to purchase two ounces of cocaine for $2,200 per ounce. Petitioner agreed to sell the cocaine and asked McCoy to package the remaining cocaine in one-ounce units. In a subsequent telephone conversation, petitioner and McCoy agreed to meet the following day so that McCoy could return petitioner's cocaine. Pet. App. 3a-4a.

On December 15, McCoy—who had been outfitted with a concealed transmitter—drove to the prearranged location where he met petitioner, who arrived in a pickup truck. McCoy entered the truck and delivered the cocaine to petitioner. While the two men were in the truck, petitioner asked McCoy, "How many ounces is that?" McCoy replied, "All that you give me." Petitioner then asked, "Did you put it in ounces for me?" to which McCoy responded, "There's ounces and there's . . . grams in there too." Pet. App. 4a. McCoy gave petitioner the package, exited the pickup truck, and signaled to the law enforcement officers that petitioner was in possession of the cocaine (*ibid.*).

As petitioner drove toward the parking lot exit, Dallas police officers Jerry Foster and Ron Hale, who had been conducting surveillance from a police vehicle, cut in front of petitioner's truck. Officer Foster immediately went to the truck, opened the door on the driver's side, and helped petitioner out of the truck. Officer Foster seized the package delivered by McCoy, which was located in the middle of the floorboard of the pickup truck, and told petitioner that he was under arrest. Pet. App. 4a-5a; III Tr. 576-577. Petitioner asked Officer Foster why he was under arrest and Officer Foster replied, "for violation of the Controlled Substances Act" (Pet. App. 20a). Petitioner asked, "What is the Controlled Substances Act," and Officer Foster answered,

"Possession of dope" (*id.* at 21a). When petitioner asked "What do you mean," Officer Foster replied "cocaine" (*ibid.*). Petitioner then declared, with reference to the seized package, that he did not know "what's in it because Don McCoy just dropped it off with me" (*ibid.*).

2. The prosecutor did not learn about petitioner's statements to Officer Foster until after the trial was under way; at that point, the prosecutor immediately asked the district court to rule upon the admissibility of the statements. Petitioner contended that the statements were inadmissible because they constituted exculpatory evidence that had not been disclosed to the defendant as required by Rule 16(a) of the Federal Rules of Criminal Procedure and this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioner also moved for a mistrial. III Tr. 586-589; IV Tr. 667-674.

The district court offered to exclude the evidence, but noted its concern that if the statements "were to be offered for the first time by [petitioner] during his case in chief * * * it would give a misleading impression to the jury and suggest to them that the government was somehow hiding the ball or suppressing the evidence" (Pet. App. 19a). Petitioner's counsel refused to state that he would not offer the evidence in petitioner's case. The court accordingly denied the motion and allowed the government to introduce the statements (*id.* at 19a-20a).

3. The court of appeals affirmed petitioner's convictions in an unpublished opinion (Pet. App. 1a-12a). It rejected petitioner's claim that the district court should have declared a mistrial because the government did not disclose before trial that Officer Foster would testify that petitioner had told him, " 'I don't know what's in [the bag] because Don McCoy just dropped it off with me' " (*id.* at 8a-9a). The court noted that the statement was inculpatory as well

as exculpatory because "it is an admission of possession and knowledge" (*id.* at 9a). The court of appeals observed that the district court had "allowed the prosecution to introduce the evidence largely on the grounds that to prohibit its introduction by the prosecution would create the unfair impression that the government had suppressed or concealed the evidence if it were later introduced by the defense" (*ibid.*). The court concluded that "[i]t was certainly no burden to the defense to have to decide at the evidentiary hearing whether [petitioner] would introduce this simple evidence in his own behalf; accordingly, [petitioner] has shown no prejudice" (*ibid.*).

The court of appeals further concluded that the prosecution did not violate Rule 16(a) of the Federal Rules of Criminal Procedure by failing to disclose the statements. Rule 16(a) provides, in pertinent part, that the government must disclose "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant * * * in response to interrogation by any person then known to the defendant to be a government agent." The court found that "Rule 16(a) does not apply to this 'confession' because it was not made in response to any interrogation" (Pet. App. 9a).

The court of appeals also upheld the district court's denial of petitioner's motion for a new trial based on newly discovered evidence. After the trial ended, petitioner and the government learned that McCoy had testified before a federal grand jury in 1980. Petitioner contended that his discovery of the fact that McCoy had testified before a grand jury entitled him to a new trial, even though he did not know anything about the substance of McCoy's grand jury testimony. Pet. App. 11a.

The court of appeals observed that "[t]o be entitled to a new trial on the grounds of newly discovered evidence, a convicted person must establish at least that: (1) the evidence is newly discovered; (2) the evidence is material and not merely [of] cumulative or impeaching value; (3) the evidence would probably lead to an acquittal; and (4) the failure to learn of the evidence was due to no lack of defense diligence" (Pet. App. 11a-12a). The court noted that McCoy had testified at the trial that he " 'probably' " had appeared before a grand jury (*id.* at 12a). Since petitioner was on notice of the likelihood that such testimony existed, the revelation that McCoy had testified before a grand jury could not constitute newly discovered evidence. In addition, the court noted that petitioner "presented no affidavits or other evidence with his motion for a new trial" and that "[c]ertainly there has been no showing that this 'new' evidence would produce an acquittal" (*ibid.*). It held that the "district court did not abuse its discretion in denying the motion for a new trial" (*ibid.*).[1]

ARGUMENT

The unanimous decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioner first contends (Pet. 6-11) that his statement to Officer Foster concerning the contents of the package delivered by McCoy should have been suppressed under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). As a threshold matter, this question is not properly before the Court

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[1]The court of appeals also rejected petitioner's challenge to the district court's failure to instruct the jury regarding the entrapment defense (Pet. App. 5a-8a), his claims relating to the government's failure to disclose other allegedly exculpatory information (*id.* at 8a-10a), and his contention that the district court erred in denying his motion for a new trial on the grounds of perjured testimony (*id.* at 10a-11a).

because petitioner did not previously challenge the admission of this statement on the ground that the statement was obtained in violation of *Miranda*.[2] Since the issue was not raised in the courts below, it may not now be raised in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, the claim is wholly without merit.

The warnings prescribed in *Miranda* v. *Arizona, supra*, must be administered to a suspect only when the suspect is subjected to "custodial interrogation." Accordingly, statements volunteered by a suspect may be admitted into evidence without regard to whether the *Miranda* warnings were administered; a statement must be suppressed only when it was the product of custodial interrogation and was not preceded by the warnings. 384 U.S. at 444-445; see also *Rhode Island* v. *Innis*, 446 U.S. 291, 297, 299-300 (1980). The Court in *Miranda* defined custodial interrogation as "*questioning initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. 444 (emphasis added)). This concept was refined further in *Rhode Island* v. *Innis, supra*, where the Court stated that the inquiry is whether the police officer's conduct "reflect[s] a measure of compulsion above and beyond that inherent in custody itself" (446 U.S. at 300).

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[2]In both the district court and the court of appeals, petitioner contended that this statement should have been suppressed because the prosecution did not comply with its obligation to disclose the statement under Rule 16(a), Fed. R. Crim. P., and the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963). See III Tr. 586-589; IV Tr. 667-674. The courts below rejected these claims, and petitioner has not raised either of them in this Court.

Officer Foster did not initiate any questioning of petitioner; he simply responded to petitioner's questions. The exchange between Officer Foster and petitioner makes clear that petitioner volunteered the statement that he now seeks to suppress (see Pet. App. 20a-21a). In evaluating petitioner's claim that the government failed to comply with Rule 16(a) of the Federal Rules of Criminal Procedure, the court of appeals correctly concluded that petitioner's statement "was not made in response to any interrogation" (Pet. App. 9a). For that reason, *Miranda* is not implicated here.

Petitioner asserts (Pet. 10-11) that Officer Foster's statements, and the fact that he was holding the package found in petitioner's truck, amounted to "the functional equivalent of express interrogation" (*id.* at 10). This Court stated in *Innis* that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (446 U.S. at 301 (footnotes omitted)). Under that standard, Officer Foster's conduct clearly did not constitute interrogation. Officer Foster had no reason to expect that his conduct would elicit an incriminating statement from petitioner; he simply responded to petitioner's questions while retaining custody of an important piece of evidence. Moreover, Officer Foster's actions plainly were those "normally attendant to arrest and custody" and thus cannot be classified as "interrogation." *Miranda* therefore does not require the suppression of petitioner's volunteered statement.[3]

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[3]Petitioner's reliance (Pet. 10) upon *Randall* v. *Estelle*, 492 F.2d 118 (5th Cir. 1974), is misplaced. The defendant in that case "was the focal point of an intensive interrogation by three police officers in the distinctly unfamiliar environs of a police car" (492 F.2d at 120). By contrast, petitioner was not subjected to any express interrogation.

2. Petitioner also contends (Pet. 11-15) that he was entitled to a new trial on the basis of newly discovered evidence. However, the court of appeals properly concluded (Pet. App. 11a) that the district court did not abuse its discretion in denying petitioner's motion for a new trial.

During the trial, petitioner's counsel asked McCoy whether McCoy had testified before a federal grand jury during 1981 in connection with " 'some of [his] other cases' "; McCoy stated that he could not recall (Pet. 11). In response to a subsequent inquiry relating to previous grand jury testimony, McCoy answered, "I probably have. I don't remember the exact time. I have been before, I imagine, yes, sir" (Pet. App. 12a). Petitioner observes that "[t]he matter [of McCoy's prior grand jury testimony] was not thereafter pursued" at trial (Pet. 12). After trial, however, both petitioner and the government discovered that McCoy had testified before a federal grand jury in 1980 (Pet. App. 11a). Petitioner's motion for a new trial was based upon this alleged newly discovered evidence.

To demonstrate that he was entitled to a new trial on this ground, petitioner was required to establish that (1) the evidence was newly discovered; (2) the evidence was material and not merely cumulative or impeaching; (3) the evidence probably would lead to an acquittal; and (4) his failure to discover the evidence until after trial was not occasioned by his lack of diligence. *United States* v. *Herman*, 614 F.2d 369, 371 (3d Cir. 1980); *United States* v. *Pappas*, 602 F.2d 131, 133 (7th Cir.), cert. denied, 444 U.S. 949 (1979); *United States* v. *Johnson*, 596 F.2d 147, 148 (5th Cir. 1979); *United States* v. *Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978). Petitioner plainly failed to satisfy this standard.

First, petitioner has made no showing that the evidence is material and not merely cumulative or impeaching. Indeed, petitioner argues that the evidence is important *solely*

because it might provide a basis for impeaching McCoy (Pet. 13-14). This is ordinarily not a sufficient reason for requiring a new trial. See *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956); *United States* v. *Rodriguez*, 738 F.2d 13, 18 (1st Cir. 1984); *United States* v. *Librach*, 609 F.2d 919 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

Second, as the court of appeals observed, petitioner has not established that "this 'new' evidence would produce an acquittal" (Pet. App. 12a). Petitioner states (Pet. 14) that McCoy was "the pivotal witness," but he does not indicate how the allegedly "new" evidence would cast doubt upon McCoy's testimony.[4]

Finally, the court of appeals noted that McCoy's trial testimony "put [petitioner] on notice, if it did not give actual knowledge, that McCoy had testified previously" (Pet. App. 12a). This finding that petitioner failed to exercise diligence in pursuing the question of the existence of grand

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[4]Petitioner intimates (Pet. 13-14), that the Sixth Amendment somehow is relevant in assessing his claim. But the Sixth Amendment has no bearing on this case, as petitioner was not in any way denied his right to confront McCoy. Petitioner's reliance upon *Davis* v. *Alaska*, 415 U.S. 308 (1974), is misplaced. In that case, which did not concern newly discovered evidence, this Court reversed the defendant's conviction after the trial court severely limited his cross-examination of "a crucial witness for the prosecution" (415 U.S at 310). Petitioner, by contrast, encountered no such limitation on his ability to cross-examine McCoy. Any inadequacy in the cross-examination of McCoy resulted from petitioner's own failure to pursue the question of McCoy's grand jury testimony.

Moreover, petitioner has not shown that the government knowingly elicited or failed to correct perjured testimony, as was the case in *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Miller* v. *Pate*, 386 U.S. 1 (1967); and *Giles* v. *Maryland*, 386 U.S. 66 (1967). Indeed, petitioner does not dispute the court of appeals' conclusion (Pet. App. 11a) that the government did not learn of McCoy's 1980 grand jury testimony until after the end of the trial.

jury testimony is itself a sufficient reason for the denial of petitioner's motion for a new trial.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Petitioner asserts that the prosecution also "knew or should have known" of this evidence during trial (Pet. 13) and that his duty to exercise diligence was satisfied by a general pretrial request for "all discoverable materials relating to McCoy" (Pet. 14). But whether the prosecution also "knew or should have known" of the existence of McCoy's grand jury testimony is irrelevant in assessing petitioner's own diligence; moreover, a pretrial discovery request has no bearing on whether petitioner exercised diligence after first learning, during trial, that McCoy previously had appeared before a grand jury.

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